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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAY - 8 2001

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments,)
FM Broadcast Stations.)
(Emmetsburg and Sibley, Iowa))

MM Docket No. 01-65
RM-10078

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Attention: **Mail Stop 1800D5**

REPLY TO COUNTERPROPOSAL

1. Eisert Enterprises, Inc. ("Eisert"), licensee of KDWD(FM) [formerly KEMB(FM)], Channel 261A, Emmetsburg, Iowa, by its attorneys, hereby submits its Reply to the Counterproposal of Saga Communications of Iowa, LLC ("Saga"), filed on April 23, 2001. As demonstrated below, Saga's Counterproposal is unacceptable because, *inter alia*, Eisert's proposal would provide new service to more persons than Saga's counterproposal – a determinative factor, and the rules preclude Saga from seeking an upgrade of a vacant allotment.

2. Background. Saga is the licensee of three AM and six FM stations licensed to communities in Iowa, three of which are licensed to Spencer, Iowa, where Eisert's main studio is located.¹ Obviously, Saga and Eisert are competitors. In an apparent effort to lessen its competition and thwart Eisert's efforts to upgrade KDWD from a Class A to a Class C3 and

¹ Saga is the licensee of KLTI-FM, Ames, Iowa; KXTK(AM), KRNT(AM), KIOA-FM, and KSTZ(FM), Des Moines, Iowa; KAZR(FM), Pella, Iowa; and KICD(AM/FM) and KLLT(FM), Spencer, Iowa.

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improve service of this 25-year-old station, Saga counter proposed upgrading vacant channel 261A at Brandon, South Dakota – an upgrade which would be mutually exclusive with the proposed KDWD upgrade.

3. The Channel 261A Allotment at Brandon. Channel 261A was allotted to Brandon at the conclusion of a contested rule making proceeding. *Sibley, Iowa and Brandon, South Dakota*, 13 FCC Rcd 22209 (1998), *recon. denied*, 15 FCC Rcd 19130 (2000). In sum, 21st Century Radio Ventures, Inc. ("21st Century"), the permittee of KAJQ, Channel 262A, Sibley, Iowa, proposed substituting Channel 263C3 for Channel 262A at Sibley, reallocating Channel 261C3 to Brandon, and upgrading the KAJQ permit accordingly. *Id.* Brandon Broadcasters counter proposed the allotment of Channel 261A to Brandon. *Id.* The Allocations Branch agreed with Brandon Broadcaster's counterproposal and allotted Channel 261A to Brandon after determining that it would be preferential to have a Channel 261A allotment at Brandon and a Channel 262A allotment at Sibley rather than just a Channel 263C3 allotment at Brandon. *Id.* Saga failed to express an interest in operating a station in Brandon during the Sibley/Brandon proceeding.

4. Although Brandon Broadcasters expressly stated its intent to apply for the Channel 261A allotment at Brandon during the Sibley/Brandon proceeding – a prerequisite to the Commission allotting the channel – the Commission never has provided Brandon Broadcasters with that opportunity.² Moreover, it should be noted that Eisert intends to compete with Brandon Broadcasters for the Channel 261A allotment at Brandon once it becomes available for auction.

² The Channel 261A allotment at Brandon was not included among the vacant channels in the upcoming Auction No. 37 apparently because the allotment was subject to 21st Century's pending petition for reconsideration.

If the Commission were to upgrade the vacant allotment at Brandon to a Class C3 facility, it would deprive Brandon Broadcasters and other interested parties that expressly stated interest in the Class A facility of their only opportunity to apply for it.

5. Eisert's Proposal Would Serve More New Listeners than Saga's. As demonstrated in Eisert's Technical Statement, attached hereto as **Exhibit I**, using now-available 2000 U.S. Census data, the upgrade of KDWD from a Class A to a Class C3 station would provide new 60 dBu service to 28,607 persons spread over 2,311.9 square kilometers – more than twice as many people who now receive the KDWD service.³ By contrast, again using now-available 2000 U.S. Census data, upgrading the vacant channel at Brandon from a Class A to a Class C3 *theoretically* would provide new 60 dBu service to only 26,223 persons spread over 2,280.1 square kilometers. *Therefore, Eisert's proposal is superior to Saga's because it would provide new 60 dBu service to 2,384 more persons than would Saga's counterproposal.* Under priority 4, this population difference is "determinative." *Benton and Dardanelle, Louisiana*, 3 FCC Rcd 4840, 4842 (citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982)); *see, also, Galesburg, Illinois and Ottumwa, Iowa*, MM Docket No. 97-130, RM-8751, DA OO-2423, released October

³ In its Petition for Rule Making and Comments and Counterproposal, Eisert stated that upgrading KDWD to a Class C3 facility would provide new service to an additional 24,193 persons spread over 2,070 square kilometers. When Eisert recalculated the number of people who would receive new service using 2000 U.S. Census data, it discovered that in its Petition and Comments it had calculated the area and population for the proposed Class C3 facility based on an actual facility, rather than a theoretical facility, despite what the Technical Statement indicated. This is why the number of square kilometers differs in this Reply. In this Reply, the 2000 census information is based on the actual facility for the Class A at Emmetsburg and the theoretical facility for the Class C3 at Emmetsburg. The Brandon numbers for the Class A and C3 both are based on theoretical facilities.

27, 2000 (stating that under priority 4, the Commission will favor the proposal that would expand service to the greatest number of persons).

6. It also must be noted that the number of persons who would receive new 60 dBu service if the Brandon channel were upgraded to Class C3 is merely theoretical since the Commission must first include the channel in a yet-to-be-determined auction proceeding, and the party that prevails at the auction would have to locate the station's transmitter at the same coordinates Saga cited in its Counterproposal – something that certainly may not happen. Even if Saga were the prevailing party at the auction, it is highly unlikely that Saga already has taken the necessary steps to purchase or lease a tower at its cited coordinates, thus, Saga's own proposed location of a transmitter could change, as could the number of persons it claims would be served. By contrast, Eisert knows that if it is allowed to upgrade KDWD to a Class C3 facility that an additional 28,607 persons will receive new service because KDWD will remain at its current tower site.

7. Emmetsburg, not Brandon, Deserves the Upgrade. Emmetsburg is the Seat of Palo Alto County, Iowa – a rural county with a widely disbursed population. As the seat of the county, Emmetsburg serves as the business, education, political, and law enforcement center for the entire county. For example, the Palo Alto County Courthouse, the Palo Alto County Sheriff's Department, and the Iowa Lakes Community College all are located in Emmetsburg. The Commission has recognized that a small town that serves as the population center for a sizeable area often needs a Class B or Class C channel in order to serve its citizens. *See FM Assignment Policies and Procedures, supra*, page 97 (reversing policy under which small towns were assigned only Class A channels, since such small stations often cannot adequately cover the affected area). Furthermore, it must be noted that Emmetsburg's population is growing – not declining, as Saga

claimed in its Counterproposal. According to the most recent 2000 U.S. Census figure, attached hereto as **Exhibit II**, Emmetsburg has an estimated 3,958 residents, reflecting an increase in population since the last census.⁴

8. Whereas Emmetsburg is a small town that is the center of life for a large rural county, Brandon is merely a bedroom community of Sioux Falls, South Dakota, which has an estimated 123,975 residents.⁵ *See Exhibit II*. Therefore, while the upgrade of KDWD at Emmetsburg will allow the station to improve service to the population center of a rural county, the upgrade of a vacant channel at Brandon theoretically would provide improved service to fewer persons in a bedroom community of a larger city at some unknown future date.

9. Moreover, as demonstrated in the attached Technical Statement, an upgraded Brandon channel would allow the station, if constructed, to place a 70 dBu signal contour over 50 percent of the Sioux Falls Urbanized Area.⁶ Despite the fact that an upgraded Brandon channel would provide service to an Urbanized Area, Saga failed to demonstrate why its Counterproposal would not preclude the Commission from treating Brandon as part of the Sioux Falls Urbanized Area for Section 307(b) purposes. *See Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) (listing eight factors that must be considered when determining whether a specified community is independent

⁴ Using 1999 population estimates, Saga claimed that Emmetsburg's population had decreased by 246 persons since 1990 – a figure which no longer holds true under the 2000 Census data.

⁵ Brandon is approximately 12 miles east of Sioux Falls. Rand McNally Road Atlas, 2000.

⁶ As Eisert demonstrated earlier, the upgrade of KDWD would not affect an urbanized area; rather, it would provide new service to tens-of-thousands of people who are widely disbursed in a rural county.

of a central city). Sioux Falls already has ten FM stations and six AM stations licensed to it, and is served by numerous other stations.⁷ Saga failed to demonstrate why its Counterproposal to provide the service of yet *another* FM station to the Sioux Falls Urbanized Area would be superior to the proposal of Eisert to improve the *only* FM service licensed to all of Palo Alto County.⁸

10. Saga May Not Seek an Upgrade of a Vacant Channel. Section 1.420(g) of the Commission's rules provides for the upgrade of a construction permit or license during a rule making proceeding to amend the FM Table of Allotments. However, the Commission has held that only permittees and licensees may take advantage of this section to upgrade a channel. *See, e.g., Arlington, Texas and Durant, Oklahoma*, 8 FCC Rcd 4281, 4282 (1993) (noting that the Commission will not entertain a proposal for an upgrade of a channel in an allotment proceeding from a pending applicant who was neither a permittee nor a licensee); *Lafayette, Louisiana*, 4 FCC Rcd 5073 (1989) (refusing to consider channel upgrade requests while applications are pending); and *Santa Margarita and Guadalupe, California*, 2 FCC Rcd 6930 (1987), *review denied*, 7 FCC Rcd 4552 (1992).

11. In *Santa Margarita and Guadalupe, California*, Armando Garcia ("Garcia") was an applicant for Channel 288A at Guadalupe, California. When the Commission initiated a rule making proceeding to substitute Channel 291B1 for Channel 292A at Santa Margarita, California, Garcia filed a counterproposal, asking that the Commission instead substitute Channel 288A for

⁷ The FM stations licensed to Sioux Falls include KSRD, KAUR, KCSD, KELO-FM, KCFS, KNWC-FM, KMXC, KTWB, KRRO, and KKLS. The AM stations licensed to Sioux Falls are KELO, KNWC, KSFS, KSOO, KWSN, and KXRB.

⁸ By contrast, Brandon is located in the same county as Sioux Falls, which is Minnehaha County, South Dakota.

Channel 290B1 at Guadalupe. In rejecting Garcia's counterproposal, the Commission first noted that Section 1.420 applies only to permittees and licensees – not applicants, such as Garcia. *Id.* page 6931. Furthermore, the Commission stated that its "*modification authority is expressly limited* [by Section 316 of the Communications Act of 1934, as amended] *to station licenses and construction permits.*" *Id.* (emphasis added).

12. If an applicant, such as Garcia, who has an obvious interest in upgrading its applied-for channel is barred from requesting and obtaining the upgrade because of its status as a mere applicant, a non-applicant, such as Saga, who is once-removed from an applicant status should have even less authority to request and obtain the upgrade of a vacant channel. This is especially true when the upgrade would foreclose a licensed station from upgrading its operating facilities to provide improved service to tens-of-thousands of persons. Under these circumstances, Saga's counterproposal is unacceptable and should not be considered.

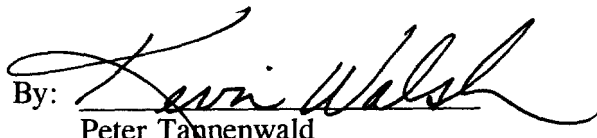
13. Conclusion. Eisert has demonstrated that: (a) Brandon Broadcasters successfully petitioned the Commission to allot Channel 261A – as opposed to Channel 261C3 – to Brandon, but that neither Brandon Broadcasters nor any other interested parties have been afforded the opportunity to apply for the channel; (b) Eisert's proposal to upgrade KDWD at Emmetsburg would serve more new listeners than Saga's counterproposal to upgrade vacant Channel 261A at Brandon; (c) Emmetsburg, as the population center of a rural county with a widely disbursed population, is deserving of an upgraded station, while the upgrade of a vacant channel at Brandon would theoretically provide improved service to fewer persons in a bedroom community of a larger city at some unknown future date; and (d) if the Commission will not allow an applicant

to request and obtain an upgraded channel, it should not allow Saga, as an entity with even less standing than an applicant, to request and obtain the upgrade of a vacant channel.

14. WHEREFORE, the premises considered, Eisert respectfully requests that the Commission dismiss Saga's Counterproposal.

Respectfully submitted,

EISERT ENTERPRISES, INC.

By: 
Peter Tannenwald
Kevin M. Walsh

Its Attorneys

IRWIN, CAMPBELL & TANNENWALD, P.C.
1730 Rhode Island Avenue, NW, Suite 200
Washington, DC 20036
(202) 728-0400

May 8, 2001

kmw/50150p.002.RPLY

EXHIBIT I

See attached Technical Statement.

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

REPLY COMMENTS
MM DOCKET #01-65
EISERT ENTERPRISES, INC.
KDWD RADIO STATION
EMMETSBURG, IOWA
May 2001

TECHNICAL EXHIBIT

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REPLY COMMENTS
MM DOCKET #01-65
EISERT ENTERPRISES, INC.
KDWD RADIO STATION
EMMETSBURG, IOWA
May 2001

TECHNICAL STATEMENT

1. This technical statement and attached exhibits were prepared on behalf of Eisert Enterprises, Inc. ("EEI"), licensee of station KDWD, Channel 261A, Emmetsburg, Iowa. EEI is the petitioner in MM Docket #01-65 seeking the substitution of Channel 261C3 for Channel 261A at Emmetsburg. In order to accommodate the allocation of Channel 261C3 at Emmetsburg, it was also requested that Channel 262A be deleted from Sibley, Iowa, without replacement.

2. In its own counterproposal, EEI proposed that, rather than the deletion of Channel 262A from Sibley, Iowa, Channel 264A be substituted for Channel 262A. Further, the channel be re-allotted to Sanborn, Iowa, as that community's first local service. Saga Communications of Iowa, LLC ("Saga"), also submitted a counterproposal that purports to seek the upgrade of the vacant, and an unapplied for, Channel 261A at Brandon, South Dakota, to Channel 261C3, which would prevent the upgrade of licensed Channel 261A to Channel 261C3 at Emmetsburg.

DISCUSSION

3. Using 1990 US Census data, Saga claims that a proposed Class C3 at Brandon, South Dakota, will provide 60 dBu service to 150,900 persons in 4,646.6 square kilometers, whereas, EEI would provide coverage to only 51,519 persons in 4,656.6 square kilometers.¹ Based on

1) Saga data is based on 1990 Census information.

this data, Saga claims that its proposal is superior to the EEI request. However, Saga has neglected to compare the theoretical service in the gain areas between Emmetsburg and Brandon. Utilizing the population within the present Class A allocation at Brandon from the Saga counterproposal, there are 129,464 persons. An upgrade at Brandon will increase the coverage to 150,900 persons, for a net increase of 21,436 persons. The upgrade at Emmetsburg, as detailed in the EEI petition, will allow for a net increase of service to 24,193 persons. Thus, the upgrade at Emmetsburg will service 2,757 more persons than would a theoretical upgrade to the vacant allotment at Brandon.

4. Using the available 2000 Census data, the existing Class A allotment at Brandon will provide 60 dBu service to 158,287 persons in 2,498.3 square kilometers. An upgrade to the vacant allotment at Brandon theoretically would provide service to 184,510 persons in 4,778.4 square kilometers, or a net increase of 26,223 persons in 2,280.1 square kilometers. The present 2000 Census population for the existing KDWD is 24,446 persons in 2,466.5 square kilometers. An upgraded KDWD to Channel 261C3 will provide coverage to 53,053 persons in 4,778.4 square kilometers. As such, there would be a net increase of 28,607 persons in 2,311.9 square kilometers. This still represents a gain of more than 2,384 persons over the Saga proposal.

REQUEST

5. Therefore, EEI requests the following amendment to §73.202 of the rules:

Emmetsburg, Iowa

Present
261A

Proposed
261C3

Sibley, Iowa

Present
262A, 282A

Proposed
282A

Sanborn, Iowa

Present

Proposed

None

264A

PUBLIC INTEREST ASPECTS

6. The upgrade of KDWD will provide the community of Emmetsburg with its first expanded coverage facility. Operating as a maximum Class C3 facility, KDWD would provide new service to 28,607 persons (2000 Census), an net increase of 2,384 persons than the proposed upgrade of the vacant allotment at Brandon. Emmetsburg is not located in or near any urbanized areas. However, Brandon is immediately adjacent to the Sioux Falls urbanized area. An upgraded Brandon channel would place a 70 dBu contour over 50% of the Sioux Falls urbanized area.² Once Channel 261C3 is allocated to Emmetsburg, EEI will submit a minor change application, FCC Form 301, requesting authorization to implement a C3 facility at Emmetsburg. Upon a grant, it will construct the improved KEMB facility.

7. The foregoing technical statement was prepared on behalf of Eisert Enterprises, Inc. by Graham Brock, Inc., its Technical Consultants. All information contained herein is true and accurate to the best of its belief and knowledge. All data regarding FM facilities was extracted from the CDBS database, as updated on April 27, 2001. We assume no liability for errors or omissions in the database which may be adverse to the requests contained herein.

2) See Exhibit #1 for Urbanized Area boundary from US Census.

Graham Brock, Inc. - Broadcast Technical Consultants

BRANDON CLASS C3 70 dBu

BRANDON CLASS A 70 dBu

43-40-00 N
097-00-00 W

Hartford

43-30-00 N

Minnehaha
096-50-00 W

096-40-00 W

096-30-00 W

096-20-00 W

Garretson

Brandon

Brandon Site

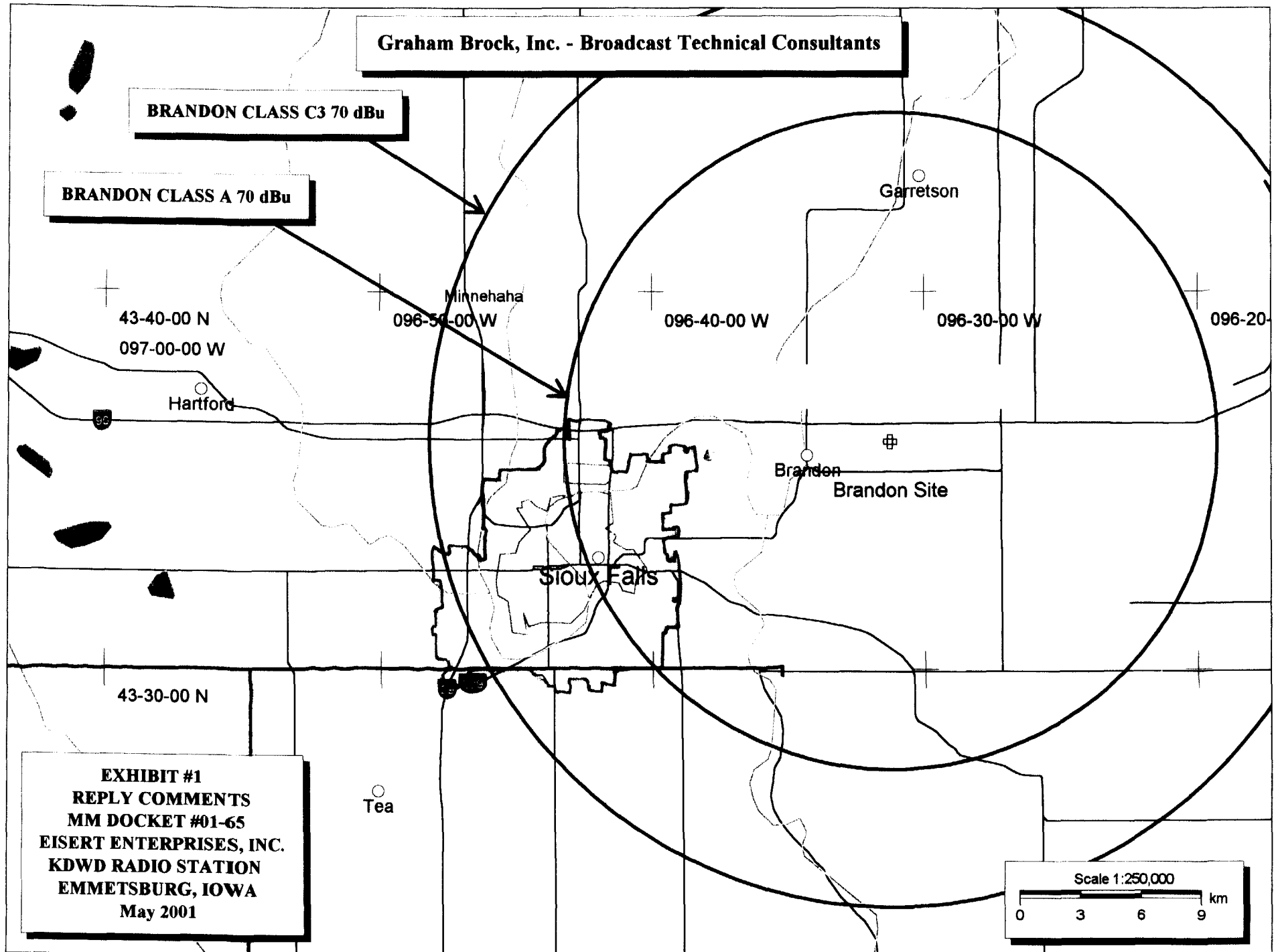
Sioux Falls

Tea

**EXHIBIT #1
REPLY COMMENTS
MM DOCKET #01-65
EISERT ENTERPRISES, INC.
KDWD RADIO STATION
EMMETSBURG, IOWA
May 2001**

Scale 1:250,000

0 3 6 9 km



AFFIDAVIT AND QUALIFICATIONS OF CONSULTANT

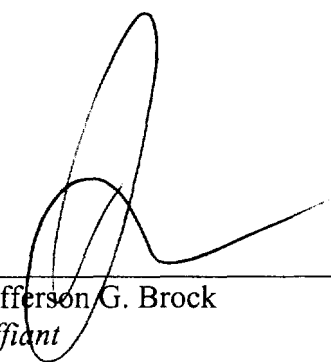
State of Georgia)
St. Simons Island) ss:
County of Glynn)

JEFFERSON G. BROCK, being duly sworn, deposes and says that he is an officer of Graham Brock, Inc. Graham Brock has been engaged by Eisert Enterprises, Inc., licensee of Radio Station KDWD, to prepare the attached Technical Exhibit.

His qualifications are a matter of record before the Federal Communications Commission. He has been active in Broadcast Engineering since 1979.

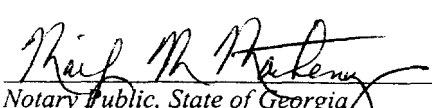
The attached report was either prepared by him or under his direction and all material and exhibits attached hereto are believed to be true and correct.

This the 7th day of May, 2001.



Jefferson G. Brock
Affiant

*Sworn to and subscribed before me
this the 7th day of May, 2001.*



Notary Public, State of Georgia
My Commission Expires: April 20, 2002

EXHIBIT II

See attached 2000 U.S. Census data.

U.S. Census Bureau

American Fact

Main | Search | Feedback | FAC

Basic Facts ▶ Quick Tables**Print/CE**

QT-PL. Race, Hispanic or Latino, and Age: 2000
 Geographic Area: **Emmetsburg city, Iowa**

NOTE: Data not adjusted based on the Accuracy and Coverage Evaluation. For information on confidentiality protection, sampling error, nonsampling error, and definitions see <http://factfinder.census.gov/home/en/datanotes/expplu.html>.

Subject	All ages		18 years and over	
	Number	Percent	Number	Percent
RACE				
Total population	3,958	100.0	3,145	100.0
One race	3,938	99.5	3,133	99.6
White	3,902	98.6	3,108	98.8
Black or African American	3	0.1	3	0.1
American Indian and Alaska Native	7	0.2	3	0.1
Asian	21	0.5	16	0.5
Native Hawaiian and Other Pacific Islander	0	0.0	0	0.0
Some other race	5	0.1	3	0.1
Two or more races	20	0.5	12	0.4
HISPANIC OR LATINO AND RACE				
Total population	3,958	100.0	3,145	100.0
Hispanic or Latino (of any race)	33	0.8	21	0.7
Not Hispanic or Latino	3,925	99.2	3,124	99.3
One race	3,907	98.7	3,112	99.0
White	3,876	97.9	3,091	98.3
Black or African American	3	0.1	3	0.1
American Indian and Alaska Native	6	0.2	2	0.1
Asian	21	0.5	16	0.5
Native Hawaiian and Other Pacific Islander	0	0.0	0	0.0
Some other race	1	0.0	0	0.0
Two or more races	18	0.5	12	0.4

(X) Not applicable

Source: U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, Matrices PL1, PL2, PL3, and PL4.

U.S. Census Bureau

American Fact

Main | Search | Feedback | FAC

Basic Facts ▶ Quick Tables**Print / E**

QT-PL. Race, Hispanic or Latino, and Age: 2000
 Geographic Area: **Sioux Falls city, South Dakota**

NOTE: Data not adjusted based on the Accuracy and Coverage Evaluation. For information on confidentiality protection, sampling error, nonsampling error, and definitions see <http://factfinder.census.gov/home/en/datanotes/expplu.html>.

Subject	All ages		18 years and over	
	Number	Percent	Number	Percent
RACE				
Total population	123,975	100.0	92,737	100.0
One race	121,859	98.3	91,860	99.1
White	113,938	91.9	86,786	93.6
Black or African American	2,226	1.8	1,410	1.5
American Indian and Alaska Native	2,627	2.1	1,659	1.8
Asian	1,479	1.2	987	1.1
Native Hawaiian and Other Pacific Islander	68	0.1	40	0.0
Some other race	1,521	1.2	978	1.1
Two or more races	2,116	1.7	877	0.9
HISPANIC OR LATINO AND RACE				
Total population	123,975	100.0	92,737	100.0
Hispanic or Latino (of any race)	3,087	2.5	1,888	2.0
Not Hispanic or Latino	120,888	97.5	90,849	98.0
One race	119,070	96.0	90,087	97.1
White	112,703	90.9	85,998	92.7
Black or African American	2,198	1.8	1,395	1.5
American Indian and Alaska Native	2,558	2.1	1,635	1.8
Asian	1,467	1.2	979	1.1
Native Hawaiian and Other Pacific Islander	49	0.0	28	0.0
Some other race	95	0.1	52	0.1
Two or more races	1,818	1.5	762	0.8

(X) Not applicable

Source: U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, Matrices PL1, PL2, PL3, and PL4.

The data in this table have not been adjusted for estimated net census coverage error based on the results of the Accuracy and Coverage Evaluation. To maintain confidentiality, the Census Bureau applies statistical procedures that introduce some uncertainty into data for small geographic areas with small population groups. The census results in this table contain nonsampling error, but do not contain sampling error. Data users who create their own estimates using data from American FactFinder tables should cite the Census Bureau as the source of the original data only. See also definitions of subject characteristics and geographic definitions. For the full technical documentation for the Census 2000 Redistricting Data (P.L. 94-171) Summary File, which is the source of data in this table, see <http://www.census.gov/prod/www/abs/pl94-171.pdf>.

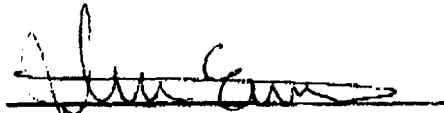
DECLARATION OF JOHN EISERT

I, John Eisert, hereby declares as follows:

1. I am the President of Eisert Enterprises, Inc. ("Eisert"), licensee of KDWD(FM), Emmetsburg, Iowa.

2. I have reviewed the foregoing "Reply to Counterproposal" and the facts set forth therein are true and correct to the best of my information, knowledge, and belief.

I declare under the penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'John Eisert', is written over a horizontal line.

John Eisert
President
Eisert Enterprises, Inc.

May 8, 2001

CERTIFICATE OF SERVICE

I, Shannada Pickett, do hereby certify that I have, this 8th day of May, 2001, caused to be sent by first class United States mail, postage prepaid, or by hand delivery, a copy of the forgoing "Reply to Counterproposal" to the following:

Ms. Kathleen Scheuerle*
Allocations Branch
Mass Media Bureau
Federal Communications Commission
445 12th Street, NW
Room 3-A247
Washington, DC 20554

Gary S. Smithwick, Esquire
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW
Suite 301
Washington, DC 20016


Shannada Pickett

*Denotes hand delivery